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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 STATE FARM FIRE AND CASUALTY,  
11 as subrogee for Catherine Robinson,

12 Plaintiff,

13 v.

14 HELEN OF TROY, LLC, *et al.*,

15 Defendants.  
16

Case No. C15-1771-RSM

ORDER GRANTING IN PART AND  
DENYING IN PART PLAINTIFF'S  
MOTION TO EXCLUDE JOHN WEISS  
AND SANCTIONS

17 **I. INTRODUCTION**

18 This matter comes before the Court on Plaintiff State Farm Fire and Casualty as  
19 subrogee for Catherine Robinson ("State Farm")'s Motion to Exclude John Weiss and  
20 Sanctions. Dkt. #58. State Farm moves the Court for an order striking Defendants' witness  
21 John Weiss and to impose sanctions for failing to disclose Mr. Weiss and for violating this  
22 Court's prior Order compelling discovery. *Id.*; *see also* Dkt. #52. Defendants oppose this  
23 Motion, arguing that State Farm failed to meet and confer and that Plaintiff's other contentions  
24 are incorrect. *See* Dkt. #45. For the reasons set forth below, the Court GRANTS IN PART  
25 AND DENIES IN PART State Farm's Motion.  
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ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO  
EXCLUDE JOHN WEISS AND SANCTIONS - 1

## II. BACKGROUND

A full background of this case is not necessary for the purposes of this Motion. This lawsuit resulted from a fire which largely destroyed the heating pad, manufactured by Defendants, which State Farm alleges caused the fire. *See* Dkt. #1-2.

Initial disclosures were due in this case on April 22, 2016. Dkt. #15. Defendants identified a single unnamed employee as a witness. Dkt. #59 at 2. Defendants did not disclose expert witness Paul Way or witness John Weiss. *Id.* Defendants have never supplemented their initial disclosures. *Id.*

On July 7, 2016, State Farm sent its first set of discovery requests to Defendants. Dkt. #29-5. State Farm requested all documents regarding the software and hardware in the heating pad and the design and manufacturing of heating pad controllers; the “manner in which the heat pad monitors heat, current, and voltage,” all testing or certification of the software or hardware in the Heating Pad, and heating pad certifications such as those by U.L. Dkt. #29-5. On August 15, 2016, Defendants served their answers. Dkt. #29-6. Every answer includes multiple objections with limited or no substantive response.

State Farm filed a Motion to Compel the above discovery on October 13, 2016. Dkt. #28. On December 21, 2016, the Court granted State Farm’s Motion and ordered Defendants to fully and completely answer by January 6, 2017. Dkt. #52. On January 6, Defendants informed State Farm via letter that they had produced “all testing documents in Kaz’s possession in response to State Farm First Set of Discovery,” that they did not have the entire UL file, that they did not have the patent for the heating pad, and that they could not locate a document called the “Theory of Operation.” Dkt. #59 at 2-3.

On January 31, 2017, Defendants disclosed Mr. Weiss as a potential witness for the first time via responses to discovery. Dkt. #59 at 3. Discovery closed on February 27, 2017. Dkt.

1 #43. Prior to the closing of discovery, Defendants made an effort to arrange for the deposition  
2 of Mr. Weiss. *See* Dkt. #67-4.

### 3 III. DISCUSSION

#### 4 A. Legal Standard

5 Federal Rule of Civil Procedure 26(a)(1)(A) provides that “a party must, without  
6 awaiting a discovery request, provide to the other parties... the name and, if known, the address  
7 and telephone number of each individual likely to have discoverable information — along with  
8 the subjects of that information....” Rule 26(e)(1)(A) further requires that a party must  
9 supplement its initial disclosures “in a timely manner if the party learns that in some material  
10 respect the disclosure or response is incomplete or incorrect, and if the additional or corrective  
11 information has not otherwise been made known to the other parties during the discovery  
12 process or in writing....” Where a party fails to comply with these obligations, “the party is not  
13 allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a  
14 trial, unless the failure was substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1). The  
15 party facing sanctions bears the burden of proving that its failure to disclose the required  
16 information was substantially justified or is harmless. *Torres v. City of L.A.*, 548 F.3d 1197,  
17 1213 (9th Cir. 2008). Furthermore, Rule 26(a)(2) requires disclosure of expert testimony  
18 accompanied by a written report prepared and signed by the witness.  
19

20 If a party fails to comply with a discovery order, the Court may issue a variety of  
21 sanctions including, *inter alia*, designating facts to be taken as established for purposes of the  
22 action, prohibiting the disobedient party from opposing designated claims or from introducing  
23 designated matters in evidence, and rendering a default judgment against the disobedient party.  
24 Fed. R. Civ. P. 37(b)(2)(A). Attorney’s fees must be awarded “unless the failure was  
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1 substantially justified or other circumstances make an award of expenses unjust.” Fed. R. Civ.  
2 P. 37(b)(2)(C).

### 3 **B. Meet and Confer Requirement**

4 Defendants allege that State Farm has failed to meet and confer before filing this  
5 Motion. However, State Farm is not moving to compel discovery under Rule 37(a). State  
6 Farm is moving for relief from Defendants’ failure to disclose or supplement a witness, brought  
7 under Rule 37(c), and for failure to comply with a court order, brought under Rule 37(b).  
8 There is no meet and confer requirement for either type of motion. *See* Fed. R. Civ. P. 37; LCR  
9 37. Defendants argue to the contrary, but their briefing contains several critical errors. First,  
10 Defendants cite to non-existent Rule 37(a)(2)(A) with a block quote jamming together language  
11 from Rule 37(a)(1) and 37(a)(3)(A). *See* Dkt. #66 at 5. This language applies to motions to  
12 compel, not motions brought under Rule 37(b) or (c). Next, Defendants argue that a motion for  
13 sanctions must include a good faith certification, quoting Local Rule 37(a)(1). *Id.* This local  
14 rule also applies only to a motion to compel, not a motion brought under Rule 37(b) or Rule  
15 37(c). Finally, Defendants cite to an out-of-circuit case for authority on motions to compel. *Id.*  
16 (citing *Naviant Marketing Solutions, Inc. v. Larry Tucker, Inc.*, 339 F.3d 180, 187-87 (3rd Cir.  
17 2003)).  
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21 State Farm did not point out any of the above errors in its Reply brief, instead  
22 reiterating that its communications with Defendants satisfy the meet-and-confer requirement of  
23 Rule 37(a). *See* Dkt. #68 at 1-3. Although the Court could find that State Farm sufficiently  
24 met and conferred with Defendants to satisfy the Rule 37(a)(1) requirement, this requirement  
25 does not apply to the instant Motion and will not serve as a basis for its denial. The Court  
26 reminds the parties to thoroughly review the Federal Rules of Civil Procedure and this Court’s  
27 Local Rules before incorrectly citing them in briefing.  
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1                   **C. Motion to Exclude John Weiss**

2                   The Court has reviewed the arguments and facts cited by the parties on this topic.  
3 Although State Farm is correct that Defendants failed to properly disclose John Weiss as a  
4 witness in their initial disclosures and failed to supplement as required under Rule 26(e),  
5 Defendants have met their burden of showing that these failures were harmless. *See Torres*,  
6 548 F.3d at 1213. State Farm was aware of the addition of Mr. Weiss as a witness as early as  
7 January 30, 2017, well before the close of discovery, allowing for the taking of a deposition if  
8 State Farm so desired. State Farm was adequately informed as to the content of Mr. Weiss  
9 planned testimony.  
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11                   While the failure to disclose may have been harmless, Defendants’ apparent attempt to  
12 get around the expert witness disclosure requirements is not. The Court is concerned by the use  
13 of Mr. Weiss as a fact witness given the likelihood that his testimony will be “based on  
14 scientific, technical, and specialized knowledge as he holds the patent for the subject heating  
15 pad, provided a very lengthy summary of how the heating pad worked (Exh. 5), and, as Way  
16 said, Weiss is ‘...really the expert...who knows this product more intimately than anybody  
17 else.’” Dkt. #58 at 11 (citing Dkts. #59-5 and #59-1 at 101:8-10 (Way Deposition)). The Court  
18 will thus deny Plaintiff’s request to exclude Mr. Weiss for failure to disclose, but based on the  
19 record before it, the Court is not convinced that testimony from Mr. Weiss would be admissible  
20 under the Rules of Evidence.  
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23                   **D. Motion for Sanctions**

24                   State Farm argues that Defendants have failed to produce the complete U.L. file,  
25 software, or a “written explanation” (in lieu of the Theory of Operation), despite these being  
26 subjects of State Farm’s First Set of Discovery and the subsequent Court Order. Dkt. #58 at 8.  
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28 State Farm argues that these materials are available to Defendants. Defendants fail to address

1 this issue in their Response brief. *See* Dkt. #66. On Reply, State Farm credibly argues that  
2 these documents go to the key issues in this case: “how the heating pad is designed, whether it  
3 was manufactured to that design and whether the heating pad caused the fire.” Dkt. #68 at 4.  
4 State Farm requests the Court impose the most drastic sanction it can, default judgment against  
5 Defendants. *Id.* at 5-6.

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7 Defendants place the Court in a difficult position by failing to respond to this portion of  
8 State Farm’s Motion. On the other hand, State Farm fails to show how the missing documents  
9 so severely prejudice Plaintiffs as to warrant the extreme sanction of default judgment, and fails  
10 to provide meaningful guidance on how the Court could impose a less severe sanction.

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12 Accordingly, the Court will request supplemental briefing from the parties. The Court  
13 does not need further argument on whether sanctions should be imposed at all, or why default  
14 judgment is appropriate. Instead, the Court requests from each party briefing on how to craft  
15 an appropriate sanction under Rule 37(b)(2)(A)(i)-(ii). No other topic is to be discussed.

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17 Regardless of the sanction imposed, the Court “must order the disobedient party... to  
18 pay the reasonable expenses, including attorney’s fees, caused by the failure [to comply with a  
19 Court Order]...” Fed. R. Civ. P. 37(b)(2)(C). Defendants’ silence on the topic of sanctions  
20 forecloses any argument that their failure was “substantially justified” or that “other  
21 circumstances make an award of expenses unjust.” *See id.* Thus the Court will Order  
22 Defendants to pay State Farm’s reasonable expenses in bringing this Motion and in drafting the  
23 Court’s requested supplemental briefing.  
24

#### 25 26 27 **IV. CONCLUSION** 28

1 Having reviewed the relevant briefing, the declarations and exhibits attached thereto,  
2 and the remainder of the record, the Court hereby finds and ORDERS:

3 (1) Plaintiff State Farm's Motion to Exclude John Weiss and Sanctions (Dkt. #58) is  
4 DENIED with regard to excluding John Weiss and GRANTED IN PART with  
5 regard to sanctions.  
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7 (2) The Court requests supplemental briefing as to an appropriate sanction as described  
8 above. This briefing shall be submitted no later than **seven (7) days from the date**  
9 **of this Order** and may not exceed **five (5) pages** in length. No response or reply  
10 brief is permitted.  
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12 (3) **No later than ten (10) days from the date of this Order**, State Farm shall file a  
13 Motion for Attorneys' Fees, noting it for consideration the second Friday after filing  
14 and service of the Motion. The Motion shall be limited to five (5) pages and be  
15 supported by documentary evidence reflecting only the amount of reasonable fees  
16 and costs incurred in filing the instant Motion and requested supplemental briefing.  
17 Plaintiffs may file a Response no later than the Wednesday before the noting date,  
18 addressing only the reasonableness of the fees and costs requested, and limited to  
19 five (5) pages. No Reply is permitted.  
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21 DATED this 31 day of May, 2017.  
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24 RICARDO S. MARTINEZ  
25 CHIEF UNITED STATES DISTRICT JUDGE  
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